PP v. MUHAMMAD SAIFULLAH AWANG

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
[CRIMINAL APPEAL NO: W-05(S)-32-02-2015]
18 JANUARY 2016

CRIMINAL PROCEDURE: *Appeal – Sentence, against – Appeal by prosecution – Penal Code, s. 304(a) – Culpable homicide – Stabbing deceased in chest – Accused sentenced to eight years imprisonment – Whether sentence imposed adequate – Whether reflects gravity of offence – Whether accused had intention to cause death of deceased – Claim of minimal involvement in crime – Whether accused entitled to lenient sentence – Public interest – Mitigating factors – Severity of offence committed – Whether sentence imposed ought to be enhanced*

CRIMINAL LAW: *Penal Code – Section 304(a) – Culpable homicide – Stabbing deceased in chest – Accused sentenced to eight years imprisonment – Conviction and sentence – Appeal against – Appeal by prosecution – Whether sentence imposed adequate – Whether reflects gravity of offence – Whether accused had intention to cause death of deceased – Claim of minimal involvement in crime – Whether accused entitled to lenient sentence – Public interest – Mitigating factors – Severity of offence committed – Whether sentence imposed ought to be enhanced*

The respondent, together with three other persons who were still at large, was initially charged for the offence of murder under s. 302 read together with s. 34 of the Penal Code for causing the death of one Mohd Nazrie Abu Bakar ('the deceased'). Thereafter, an alternative charge was proffered against the respondent under s. 304(a) of the Penal Code for the act of causing bodily injury resulting in the death of the deceased with the knowledge that it was likely to cause death. The respondent pleaded guilty to the alternative charge. The High Court Judge duly convicted the respondent and sentenced him to eight years imprisonment. Dissatisfied, the Public Prosecutor appealed. The main issue that arose was whether the sentence imposed by the trial judge was manifestly inadequate and that he had failed to consider public interest in passing the sentence. The prosecution also submitted that the sentence passed was incompatible with the facts and the cruel act committed by the respondent which had resulted in the loss of a life. The respondent, on the other hand, submitted that the sentence had been rightfully passed by the High Court Judge after having considered all the mitigating factors as the respondent was a young offender and had pleaded guilty at the earliest stage. The respondent also urged that the imprisonment term passed by the High Court Judge was in order, thus it did not merit an appellate intervention.

Held (allowing appeal)
Per Mohtarudin Baki JCA delivering the judgment of the court:

(1) The eight years imprisonment term was manifestly inadequate as it did not reflect the gravity of the offence committed by the respondent. The imprisonment term imposed against the respondent was out of step with the trend of sentencing imposed as the trend of sentencing for offences of almost similar nature as this case varied from 12 years to 20 years. The High Court Judge did not consider the intention of Parliament in amending the provision enforced on 6 March 2007 to increase the maximum jail term from 20 years to 30 years when he imposed eight years of imprisonment for a serious criminal offence under s. 304(a) of the Penal Code. (para 12)

(2) The deceased had been stabbed multiple times by the respondent and his friends. The respondent had admitted to stabbing the deceased on his chest once. Regardless of his claim pertaining to his minimal involvement in the crime, his action led to only one conclusion; he had the intention to cause the deceased's death. The respondent had used extreme cruelty without mercy when he stabbed the deceased on his chest where the vital organ (heart) is located. The manner in which the respondent and his friends tried to dispose of the deceased's body *ie*, by throwing it into the river showed that they did not value the precious human life. The fatal injury which had resulted in the deceased's death would have been caused by three other persons who were still at large. Nonetheless, this fact did not entitle the respondent to a lenient sentence. (para 13)

(3) The trial judge did not give due appreciation to the degree of cruelty that was involved to impose a heavier sentence for the sake of public interest as opposed to giving priority to the respondent's interest. The correct approach would be to have a balance between the interests of the public and the interests of the accused. The fact that it was the respondent's first offence could not outweigh public interest. A plea of guilty, although could be considered as a mitigating factor, should not be given too much of importance in the light of severity of the offence committed. Similarly, the respondent's pleas that he has a family to support should not have any significance as he should have thought of the consequences of his action before committing the offence. (para 14)

(4) The sentence passed by the High Court judge required interference. A deterrent sentence must be passed to strengthen public confidence that an offence of this nature will be severely punished by the court. A long imprisonment term by the court will create fear in the minds of future offenders besides sending a message to the public about the seriousness of this offence. Accordingly, the sentence of eight years imprisonment was set aside and substituted thereof with a sentence of 12 years' imprisonment. (paras 16 & 17)

***Bahasa Malaysia** Headnotes*

Responden, bersama-sama dengan tiga orang lain yang masih bebas, pada mulanya didakwa dengan kesalahan membunuh di bawah s. 302 dibaca bersama-sama s. 34 Kanun Keseksaan kerana menyebabkan kematian Mohd Nazrie Abu Bakar ('si mati'). Kemudian, satu pertuduhan pindaan telah ditawarkan kepada responden di bawah s. 304(a) Kanun Keseksaan atas tindakannya menyebabkan kecederaan badan mengakibatkan kematian si mati dengan pengetahuan bahawa ia mungkin menyebabkan kematian. Responden mengaku salah ke atas pertuduhan pindaan. Hakim Mahkamah Tinggi mensabitkan responden dan menjatuhkan hukuman penjara lapan tahun. Tidak berpuas hati, Pendakwa Raya merayu. Isu utama yang timbul adalah sama ada hukuman yang dikenakan oleh hakim bicara jelas tidak memadai dan bahawa beliau gagal mempertimbangkan kepentingan awam dalam menjatuhkan hukuman. Pihak pendakwaan juga menghujahkan bahawa hukuman yang dijatuhkan tidak sesuai dengan fakta-fakta dan tindakan kejam yang dilakukan oleh responden yang menyebabkan kehilangan nyawa. Responden pula menghujahkan bahawa hukuman yang dijatuhkan oleh Hakim Mahkamah Tinggi betul setelah mengambil kira faktor-faktor mitigasi kerana responden seorang pesalah muda dan mengaku bersalah pada peringkat awal. Responden juga menghujahkan bahawa hukuman penjara adalah teratur, oleh itu tidak mewajarkan campur tangan rayuan.

Diputuskan (membenarkan rayuan)
Oleh Mohtarudin Baki HMR menyampaikan penghakiman mahkamah:

(1) Hukuman penjara lapan tahun jelas tidak memadai kerana tidak mencerminkan keseriusan kesalahan yang dilakukan oleh responden. Tempoh pemenjaraan yang dijatuhkan atas responden terkeluar daripada trend hukuman yang dikenakan kerana trend hukuman bagi kesalahan-kesalahan yang serupa dengan kes ini mempunyai kepelbagaian dari 12 hingga 20 tahun. Hakim Mahkamah Tinggi tidak mengambil kira niat Parlimen apabila meminda peruntukan yang dikuat kuasa pada 6 Mac 2007 untuk meningkatkan hukuman penjara maksimum dari 20 tahun kepada 30 tahun apabila beliau menjatuhkan hukuman penjara selama lapan tahun untuk satu kesalahan jenayah yang serius di bawah s. 304(a) Kanun Keseksaan.

(2) Si mati ditikam beberapa kali oleh responden dan kawan-kawannya. Responden mengaku menikam si mati pada bahagian dadanya sekali. Tanpa mempertimbangkan tuntutannya bahawa penglibatannya dalam jenayah ini adalah minimal, tindakannya membawa kepada satu kesimpulan sahaja; dia mempunyai niat untuk menyebabkan kematian si mati. Responden menggunakan kekejaman melampau apabila menikam

si mati pada bahagian dada di mana terletaknya organ penting (jantung). Cara responden dan kawan-kawannya cuba melupuskan mayat si mati iaitu dengan membuangnya ke dalam sungai menunjukkan mereka tidak menghargai nyawa manusia. Kecederaan maut yang menyebabkan kematian si mati telah dilakukan oleh tiga orang yang lain yang masih bebas. Namun begitu, fakta ini tidak memberi hak kepada responden untuk mendapatkan hukuman yang ringan.

(3) Hakim bicara tidak memberi penekanan yang dijangka kepada tahap kekejaman yang terlibat untuk mengenakan hukuman yang lebih berat bagi kepentingan awam berbanding dengan memberi keutamaan kepada kepentingan responden. Pendekatan yang sepatutnya diambil adalah untuk mempunyai satu keseimbangan antara kepentingan awam dengan kepentingan tertuduh. Fakta bahawa ini adalah kesalahan responden yang pertama tidak boleh melebihi kepentingan awam. Pengakuan salah, walaupun boleh diambil kira sebagai faktor mitigasi, tidak perlu diberi kepentingan memandangkan keseriusan kesalahan yang dilakukan. Begitu juga, rayuan responden yang dia mempunyai keluarga untuk disara tidak perlu diberi kepentingan kerana dia sepatutnya memikirkan akibat tindakannya sebelum melakukan kesalahan itu.

(4) Hukuman yang dijatuhkan oleh Hakim Mahkamah Tinggi mewajarkan campur tangan. Hukuman berat mesti diluluskan untuk mengukuhkan keyakinan orang ramai bahawa kesalahan seperti ini akan dihukum dengan keras oleh mahkamah. Hukuman penjara yang panjang akan mewujudkan perasaan gementar dalam fikiran pesalah-pesalah yang akan datang dan menghantar pesanan kepada pihak awam berkenaan keseriusan kesalahan ini. Oleh itu, hukuman penjara lapan tahun diketepikan dan diganti dengan hukuman penjara 12 tahun.

Case(s) referred to:

Abu Bakar Alif v. R [1952] 1 LNS 4 HC ***(refd)***
Anak Apo & Satu Lagi v. PP (Q-05(S)-311-12-2012) (Unreported) ***(refd)***
Azwel Mohd Ali lwn. PP [2012] 6 CLJ 809 CA ***(refd)***
Jamal Husin & Anor v. PP [2011] 1 LNS 1746 CA ***(refd)***
Kesavan Baskaran v. PP [2008] 6 CLJ 390 CA ***(refd)***
Melvani v. PP [1971] 1 LNS 78 HC ***(refd)***
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 ***(refd)***
PP v. Kanadasan Sankaran & Anor [2010] 1 CLJ 596 CA ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Mohd Zainudin Ali (A-05-259-10-11A) (Unreported) FC ***(refd)***
PP lwn. Ramakrishnan Subramaniam & Ors [2012] 9 CLJ 443 CA ***(refd)***
PP v. Yap Chong Fatt [1962] 1 LNS 144 HC ***(refd)***
Sinnathurai Subramaniam v. PP [2011] 5 CLJ 56 CA ***(refd)***
Tukiran Taib v. PP [1955] 1 LNS 166 HC ***(refd)***

Legislation referred to:
Penal Code, ss. 34, 302, 304(a)

For the appellant - Muhammad Yasser Mohd Nasri; DPP
For the respondent - Fahri Azzat; M/s Azzat & Izzat

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal No: 45B-53-07-2013 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohtarudin Baki JCA:

Introduction

[1] The respondent was initially charged for the offence of murder under s. 302 read together with s. 34 of the Penal Code for causing the death of one Mohd Nazrie bin Abu Bakar. He was charged for the said offence together with three other persons who are still at large. Thereafter, an alternative charge was proffered against the respondent under s. 304(a) of the Penal Code which reads as follows:

> Bahawa kamu bersama-sama 3 orang lagi yang masih bebas antara 23.6.2012 jam lebih kurang 8.00 malam sehingga 24.6.2012 jam lebih kurang 4.00 petang bertempat di alamat rumah tidak bernombor, tepi landasan keretapi, Kampung Segambut Gate, Segambut, dalam Daerah Sentul, di Wilayah Persekutuan Kuala Lumpur, di dalam mencapai niat bersama menyebabkan kecederaan tubuh badan yang menyebabkan kematian terhadap Mohd Nazrie bin Abu Bakar (No K/P: 780407-02-5593) dengan mengetahui bahawa perbuatan kamu mungkin boleh menyebabkan kematiannya dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan dibaca bersama Seksyen 34 Kanun Keseksaan.

[2] The respondent had pleaded guilty to the alternative charge. The learned High Court Judge duly convicted the respondent and had sentenced him to eight years of imprisonment, with effect from the date of arrest. Dissatisfied with the decision, Public Prosecutor had appealed to this court against the inadequacy of the sentence imposed. We heard the appeal and after due consideration of the issues raised, we unanimously allowed the appeal and enhanced the sentence imposed to 12 years from the date of arrest. We now proffer our reasons for having done so.

The Prosecution's Case

[3] On 27 June 2012, the complainant, Rosdi bin Yusof received an information from one Anas Ali bin Omar about the discovery of a dead body which was floating in the river at Kg Segambut Gate, Kuala Lumpur. The complainant had subsequently lodged a police report and the investigation

was conducted by ASP Tan Chek Yang. The dead body was identified as Mohd Nazrie bin Abu Bakar by the father of the deceased. Police Division D2 of Bukit Aman had confirmed that the finger prints lifted from the dead body belongs to Mohd Nazrie bin Abu Bakar.

[4] Dr Nurliza binti Abdullah who conducted a post mortem on the deceased had confirmed that the cause of death was due to "deep incised wounds to the neck". The deceased had also suffered multiple stab wounds on his chest. The respondent was arrested at his house while he tried to flee from the rear door of his house. The police investigation revealed that the respondent had stabbed the deceased on his chest once ("satu kali tikaman"). The respondent together with his friends had thrown the dead body in a river located near the house where they murdered the deceased. The body was found wrapped in a plastic bag tied up at the head with a rope.

Findings Of Trial Judge

[5] The factors of mitigation considered by the learned High Court Judge in passing the sentence as appeared at pp. 17 to 18 (appeal record, vol. 1) are as follows:

(a) the respondent was a young offender (20 years old) when he committed the offence;

(b) the respondent has six siblings and his mother is working as a van driver;

(c) the respondent had pleaded guilty immediately after the alternative charge offered to him under s. 304(a) by the DPP and had saved court's time;

(d) the respondent was a first offender and remorseful;

(e) the respondent's involvement was very minimal. He stabbed the deceased only once on his chest, whereas according to the medical evidence, the cause of death was due to "deep incised wound to the neck";

(f) three other persons who were involved in this case had played a vital role in murdering the deceased; and

(g) the court should strike a balance between the interest of the respondent and public interest after having considered the factual matrix of this case.

[6] The learned DPP on the other hand had submitted that the public interest must be given a paramount consideration and the offence committed deserves a deterrent sentence. According to the DPP, the deceased was in his prime age of 34 years old when he was murdered and had left behind his wife and two young children. The unfortunate incident had given a deep impact to his family. The deceased's body was dumped in the river and his father who identified his body had suffered trauma, let alone grieving his son's death. The DPP had also confirmed that the respondent has no previous conviction.

[7] The learned High Court Judge took guidance from several decided cases on imposing sentence on the respondent. The cases are as listed below:

(i) *Tukiran Taib v. PP* [1955] 1 LNS 166; [1955] MLJ 24;

(ii) *Abu Bakar Alif v. R* [1952] 1 LNS 4; [1953] MLJ 19;

(iii) *PP v. Yap Chong Fatt* [1962] 1 LNS 144; [1963] MLJ 136;

(iv) *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256;

(v) *PP v. Jafa Daud* [1981] 1 LNS 28; [1981] 1 MLJ 315; and

(vi) *Melvani v. PP* [1971] 1 LNS 78; [1971] 1 MLJ 137.

[8] Having guided by the principles above and having considered both the mitigating and aggravating factors, the learned High Court Judge had imposed eight years as an appropriate length of imprisonment on the respondent. He said at p. 21 (appeal record, vol. 1) of his grounds as below:

> Mengambil kira semua faktor-faktor penghukuman, mahkamah menjatuhkan hukuman penjara 8 tahun terhadap Tertuduh (pesalah muda) berkuatkuasa dari tarikh dia ditangkap 03/07/2012. Mahkamah berpendapat hukuman yang dikenakan adalah memadai selepas menimbang kepentingan awam, kepentingan Tertuduh, pengakuan salah, mitigasi Tertuduh, permohonan hukuman berat oleh Pendakwa Raya, keseriusan kesalahan dan lain-lain faktor yang berkaitan.

The Appeal

[9] The main issue that arose herein was whether the sentence imposed by the learned trial judge was manifestly inadequate and that he failed to consider public interest in passing the sentence. The DPP insisted that the learned High Court Judge had failed to appreciate the public interest as opposed to the respondent's interest. He also submitted that the sentence passed was incompatible with the facts and the cruel act committed by the respondent which had resulted in the loss of a life. On the trend of sentencing for the offence of this nature on appeal to the Court of Appeal and Federal Court, he gave example of cases decided as listed below:

(a) *Anak Apo & 1 Lagi v. PP* (Q-05(S)-311-12-2012) COA, the Court of Appeal on 12 February 2014 had affirmed the sentence by the High Court on an imprisonment term of 24 years for the first appellant and 16 years for the second appellant when they both pleaded guilty to the alternative charge under s. 304(a) of the Penal Code. The dead body was thrown into the bushes and the cause of death was haemorrhage due to blunt trauma;

(b) *PP lwn. Ramakrishnan Subramaniam & Ors* [2012] 9 CLJ 443, the respondents pleaded guilty to the alternative charge under s. 304(a) of the Penal Code. The deceased was tied up and savagely beaten by the respondents using hands, wood and belt. The Court of Appeal enhanced

A the sentence from 13 years to 18 years for the third respondent and from 11 years to 15 years for the first respondent, the second respondent, the fourth respondent and the fifth respondent;

(c) *Sinnathurai Subramaniam v. PP* [2011] 5 CLJ 56, the respondent pleaded guilty to the alternative charge under s. 304(a) of the Penal Code. The B deceased and her six years old daughter were locked in a car and burnt alive. The High Court imposed 24 years of imprisonment and the Court of Appeal had affirmed it;

(d) *PP v. Kanadasan Sankaran & Anor* [2010] 1 CLJ 596, the respondents pleaded guilty to the alternative charge under s. 304(a) of the Penal C Code. They slashed the deceased with a parang on his face and neck while he was asleep. The Court of Appeal enhanced the sentence from ten years of imprisonment to 17 years for both the respondents;

(e) *Kesavan Baskaran v. PP* [2008] 6 CLJ 390, the Court of Appeal had D enhanced the sentence from 14 years of imprisonment to 18 years. The appellant pleaded guilty to the alternative charge under s. 304(a) of the Penal Code. He had beaten up the deceased to death and wrapped the dead body in a sack and threw it into a pond;

(f) *PP v. Mohd Zainudin Ali* (A-05-259-10-11A), the Federal Court had E enhanced the sentence from nine years of imprisonment to 18 years. The respondent pleaded guilty to the alternative charge under s. 304(a) of the Penal Code. The deceased was beaten on his head by using an iron rod. The deceased died at Slim River Hospital; and

(g) *Jamal Husin & Anor v. PP* [2011] 1 LNS 1746, the Court of Appeal had F affirmed 24 years of imprisonment when the appellant pleaded guilty to the alternative charge under s. 304(a) of the Penal Code. The cause of death was due to multiple slash wound on the body.

[10] Counsel for the respondent on the other hand had submitted that the G sentence had been rightfully passed by the learned High Court Judge after having considered all the mitigating factors as laid down earlier in para. 4. He prayed for leniency as the respondent was a young offender and had pleaded guilty at the earliest stage. Respondent's counsel had also urged upon us that the imprisonment term passed by the learned High Court Judge was in order, thus it does not merit an appellate intervention.

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Our Findings

[11] In an appeal against sentence, the appellate court will not usually alter the sentence unless it is shown that the trial court had imposed the sentence on wrong principles in the assessment or the sentence is manifestly inadequate I or grossly excessive. Imposition of a sentence varies according to the facts of a case. (see *PP v. Loo Choon Fatt* [1976] 1 LNS 102).

[12] We agree with the learned DPP that the eight years of imprisonment term was manifestly inadequate. This sentence obviously does not reflect the gravity of the offence committed by the respondent. The learned DPP had rightly submitted that the imprisonment term imposed against the respondent was out of step with the trend of sentencing imposed by this court. As can be seen from the cases cited by the DPP, the trend of sentencing for offences of almost similar nature as this case varies from12 years to 20 years. The learned High Court Judge did not consider the intention of the Parliament in amending the provision enforced on 6 March 2007 to increase the maximum jail term from 20 years to 30 years when he imposed eight years of imprisonment for a serious criminal offence under s. 304(a) of the Penal Code (read together with s. 34 of the same Code as charged).

[13] The facts of this instant case revealed that the deceased had been stabbed multiple times by the respondent and his friends. The respondent had admitted to stabbing the deceased on his chest once. Regardless of his claim pertaining to his minimal involvement in the crime, his action led to only one conclusion; he had the intention to cause the deceased's death. It was clear that the respondent had used extreme cruelty without mercy when he stabbed the deceased on his chest where the vital organ (heart) is located. The manner in which the respondent and his friends tried to dispose the deceased's body, ie, by throwing it in the river shows that they do not at all value the precious human life. A serious bodily crime had been committed in a brutal way. The fatal injury which had resulted in the deceased's death would have been caused by three other persons who are still at large. Nonetheless, this fact does not entitle the respondent to a lenient sentence imposed upon him.

[14] The learned High Court Judge considered the respondent's guilty plea, the fact that he is a first and young offender as well as his family background as important mitigating factors in his favour. However, we feel that the fact it was the respondent's first offence could not outweigh the public interest (see *Azwel Mohd Ali lwn. PP* [2012] 6 CLJ 809). Although the learned judge had touched on the principle of public interest, this was however not reflected in the sentence imposed. The trial judge did not give due appreciation to the degree of cruelty that was involved to impose a heavier sentence for the sake of public interest as opposed to giving priority to the respondent's interest. The correct approach would be to have a balance between the interests of the public and the interests of the accused. A plea of guilty can be considered as a mitigating factor. However, it should not be given too much of importance in the light of severity of the offence committed. Similarly, the respondent's pleas that he has a family to support should not have any significance as he should have thought of the consequences of his action before committing the offence.

[15] In applying the discretionary power on sentencing, there are several factors the court should take into account. These general principles were laid down in Federal Court's case of *Mohd Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 as below:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigation factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

[16] Having guided by the above principles, we are of the view that the sentence passed by the learned High Court Judge was manifestly inadequate that requires our interference. A deterrent sentence must be passed to strengthen public confidence that an offence of this nature will be severely punished by the court. A long imprisonment term by the court will create fear in the minds of future offenders besides sending a message to the public about the seriousness of this offence.

Conclusion

[17] For reasons given above, we are therefore of the view that eight years of imprisonment imposed by the learned High Court Judge on the respondent is manifestly inadequate and also not in line with the trend of sentencing. Accordingly, we set aside the sentence and substituted thereof with a sentence of 12 years imprisonment. The term of imprisonment is to run from the date of arrest. The appeal is therefore allowed.